LE COPY

SEP 20 1958

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NO. 389

H. L. CRAVENS AND BILL P. YEAGER,
Petitioners

vs

CITY OF AMARILLO,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS AMARILLO, TEXAS

SIMPSON, CLAYTON & FULLINGIM
AMARILLO, TEXAS

CLEO G. CLAYTON, JR.
210 FIRST NAT. BANK BLDG.
AMARILLO, TEXAS

Attorneys for H. L. Cravens and Bill P. Yeager

MILLER PRINTING CO., AMARILLO

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement of Case	3
Reasons for Granting the Writ	4
Conclusion	9
Proof of Service	9
Appendix A	10

CITATIONS

Cases:

McCandless v. United States of America, 298 U.S. 341, 80 L. Ed. 1205	4, 5, 6
United States of America vs. Coronado Beach Co., 255 U.S. 472, 65 L. Ed. 737	6
United States v. Ham, 187 F. 2d 265	7, 8
United States v. Waterhouse, 132 F. 2d 699	6

Constitutions and Statutes

Constitution of the United States Fourteenth Amendment	2, 3, 4
United States Code, title 28, Section 1257 (3)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NO.

H. L. CRAVENS AND BILL P. YEAGER,

Petitioners

vs.

CITY OF AMARILLO,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS AMARILLO, TEXAS

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas which became final on 25 June 1958.

OPINIONS BELOW

The opinion of the trial court is not reported but is in the accompanying record. The opinion of the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas is reported in Vol. 309 SW 2d. p. 903. The action of the Supreme Court of Texas in dismissing the application for writ of error to that court, "WRIT DISMISSED FOR WANT OF JURIS-

DICTION", was without written opinion and the certificate of the clerk of that court of such action is printed in Appendix A hereto, infra, page 10. The action of the Supreme Court of Texas in overruling the motion for rehearing was without written opinion and the certificate of the action of such court is printed in Appendix A hereto, infra, page 10.

JUDISDICTION

The judgment of the Court of Civil Appeals for the Seventh Supreme Judicial District, entered 27 January 1958, (reported in Vol. 309 SW 2d, p. 903) became final on 25 June 1958, the date the Supreme Court of Texas overruled the Petitioners' motion for rehearing to that court. (Appendix A, page 10 hereof). The jurisdiction of this court is invoked under 28 U.S.C., Section 1257 (3), since Petitioners set up a claim as to their title, right, privilege or immunity to own, enjoy and dispose of their property under the Constitution of the United States. Petitioners present substantial claims of denial of due process in condemnation proceedings which were repeatedly raised in proper manner and have been rejected by the state courts. The state court's judgment is not supported upon adequate and independent non-federal ground. The jurisdiction of the court is invoked under 28 U.S.C., Section 1257 (3).

QUESTIONS PRESENTED

1. Whether Condemnees in a condemnation proceeding conducted in the state court are denied their property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, when the trial tribunal compels them to resort to the same theory of values as used by the Condemnor.

2. Whether Condemnees are denied due process in a condemnation proceeding conducted by a state court which deter-

mines the value of the land being taken solely on the basis of the theory of value as presented by Condemnor and in total rejection, for consideration, of a material theory of value as presented by Condemnees.

STATUTE INVOLVED

The Fourteenth Amendment to the Constitution of the United States pertaining to due process.

STATEMENT OF CASE

This is an action instituted by the *City of Amarillo, Texas*, Condemnor, for the purpose of condemning certain lands owned by Petitioners, Condemnees.

Even though the appearance of this petition seems to involve only questions of admissibility of evidence, this is not the underlying true criterion upon which this petition for Writ of Certiorari is based. The state trial court excluded evidence offered by Condemnees which could be controlling and which was material and pertinent to Petitioners' rights as landowners in the condemnation proceedings. The trial court excluded, in its entirety, the evidence presented by Condemnees as regards the value of their land being condemned and, in effect, compelled them to resort to the same basis of value as desired by Condemnor. Condemnees offered to present the "capitalization method of rental value", generally used by appraisers to establish the value of the lands being taken, according to their highest and best use. The Condemnor desired to rely upon the theory of "comparables" as a basis of value. The state courts refused to permit the introduction for consideration the basis of value as offered by Condemnees, but, in effect, compelled Condemnees to resort to the basis of "comparables" as relied upon by Condemnor. Such action on the part of the state courts denied Petitioners due process of law and was repugnant to the Fourteenth Amendment to the Constitution of the United States.

REASONS FOR GRANTING THE WRIT

The Fourteenth Amendment was violated in that the state deprived Petitioners of their property without due process of law. The state courts, in conducting the condemnation proceedings, would not accord Petitioners a "full and adequate hearing" to which the were entitled in establishing the highest market value of their property being taken for public purposes as determined from its adaptability to its highest and best use.

This Honorable Court in *McCandless V. United States of America*, 298 U.S. 341, 80 L. Ed. 1205 said,

> "The questions for our consideration are whether the ruling of the trial court refusing to admit certain evidence and offers of evidence was erroneous, and, if so, whether the rejection of such evidence may be disregarded *as not substantially prejudical under* Section 269 of the Judicial Code as amended, U.S.C.A. title 28, Section 391."

This Court further stated:

> "Petitioners offered further to prove that the surplus water could be captured and transported practicably and economically and used profitably for the cultivation of sugar cane; and that the cost of recovering the water and transporting it would be less per million gallons than that incurred for recovery and transportation of water to the cane lands on the Island of Oahu and other islands in this territory.
>
> These offers, and evidence of a similar character sought to be elicited from witnesses, were rejected by the trial court upon the ground that the possibility of bringing water from outside sources was too remote and speculative."

In the case now under consideration before this Court, Petitioners offered to establish in the state court that the lands being condemned could be practicably, economically and profitably used for subdivision or residential uses—*in spite of the city's witnesses testifying to the contrary*. Further, Petitioners offered to establish that the cost and other necessary features to be

considered in attempting to convert the property being condemned to residential or subdivision uses could be done on a reasonable, economical and profitable basis — *in spite of the city's witnesses to the contrary.*

This Honorable Court in the *McCandless* case, supra, further stated, and adopted cited authorities, viz:

> "The rule is well settled that, in condemnation cases; the most profitable use to which the land can probably be put in the reasonably near future may be shown and considered as bearing upon the market value; and the fact that such use can be made only in connection with other lands does not necessarily exclude it from consideration if the possibility of such connection is reasonably sufficient to affect market value."

This Honorable Court further said in the *McCandless* case, supra:

> "The Court below, while ruling that the rejection of the evidence was erroneous, *held that it was not prejudicial within the terms of Section 269 of the Judicial Code as amended.* The Court thought the offers of proof were not sufficiently specific to enable it to say that rejection, although erroneous, was prejudicial. Apparently what was meant by the offers not being sufficiently specific, as indicated by a statement earlier in the opinion, is that they did not show what would be the value of the land when reclaimed, nor the cost of developing and delivering a sufficient water supply. But that seems to be the exact basis of the government's contention that the offer was not complete, while affirming the court below, *we have just held is without merit.* We think equally it constitutes no ground for sustaining the ruling of the court as *non-prejudicial.* The action of the trial court in rejecting the offers plainly meant that it would be useless to offer further evidence supplementing and dependent upon that which had been rejected. Faced with that ruling and implication, counsel was not required to offer further evidence along that line."

This Honorable Court in the *McCandless* case, supra, reiterated the following principle:

"In an eminent domain proceeding, *the vital issue—and generally the only issue—is that of just compensation.* The proof here offered *necessarily related to the value of the land when used for a purpose to which it probably could be put within the rule laid down to the Olson case*, 292 U.S. 246, 78 L. Ed. 1236, supra, *to exclude from the consideration of the jury evidence of this elementary character could not be otherwise than prejudicial.*"

In the *McCandless* case, supra, this Court held that the rejection of the evidence offered was prejudicial to the landowner's rights and reversed the case.

This Court in *United States of America vs. Coronado Beach Co.*, 255 U.S. 172, 65 L. Ed. 737, in considering evidence material to a condemnation suit said:

"A subordinate objection is urged to the admissions of maps or drawings showing the adaptability of the island to a great system of improvements possible if the *Coronado Beach Company* owned the submerged land. *It is urged that such improvements were speculative, remote, and not shown to be commercially practicable.* But the drawings were admitted only to illustrate the opinion of the witness as to value and were explained as meaning no more. *If the reasons for his opinion were inadequate, they detracted from the weight of his testimony, but were not inadmissible on that account.*"

It is respectfully urged that all of the objections interposed by the *City* during the hearing conducted before the state court went only to the weight of the evidence offered and not to the admissibility.

In *United States v. Waterhouse*, 132 F. 2d 699, the Circuit Court for the Ninth Circuit in a case affirmed by this Honorable Court by Written Memorandum (88 L. Ed. 1047) held:

"In condemnation proceeding, capitalization of rental value of the land is evidence of market value of the land."

In the case at hand the evidence offered by Petitioners was to establish, on behalf of Petitioners, the market value of their

lands by capitalization of rental value. The state courts committed error in refusing to permit Petitioners to offer rental value as desired.

In the *Waterhouse* case, supra, the Court further said:

> "The 'market value' of land taken for public use must be determined in light of all shown facts in connection with those of general notoriety. Further, in condemnation proceeding, if evidence shows reasonable probability of adaptability of lands for uses specified, evidence regarding prospective uses is admissible, *and whether adaptability affects market value is for jury.* Further, in proceeding to condemn sugar cane lands adaptable for other uses, evidence regarding 'market value' based on buyer's recognition of uses and capitalization of income from land *was properly admitted.* Further, in proceedings to condemn sugar cane lands adaptable for other uses, *value of lands was for jury.*"

In *United States v. Ham*, 187 F. 2d 265, *The government was compelled by the trial court* to refrain from offering evidence in support of its basis upon which it desired to value the lands being condemned. *This is the identical position in which Petitioners find themselves in the State Courts.* Also, in *United States v. Ham*, supra, the government was compelled to resort to the same theory of basis of valuation as resorted to by the opposing party, even though it did not believe such basis was proper. *This is the identical situation in which Petitioners were placed in the State Courts.* In *United States v. Ham*, supra, the defendant landowners undertook to show net income by introduction of detailed schedule, whereas the government desired to resort to "comparables". In view of the court's ruling in the *Ham* case, the government was compelled to resort to the "net income approach" desired by the landowners and refused the right to use the "comparable" basis. *In the case at hand, the City desired to limit determination of the value of the lands being taken to "comparable sales", whereas, Petitioners desired to use the "capitalization" approach.*

In *United States v. Ham*, supra, the Court of Civil Appeals for the Eighth Circuit held that the action of the trial court in depriving the government of its right to use its theory of the case was erroneous. If such action on the part of the trial court would be prejudicial to the Condemnor of such a nature as to require reversal and remand, *then, surely, such erroneous action on the part of the State Courts as regards a landowner, who is insisting and relying upon his Constitutional rights, as accorded him, would be deprived of due process by such action and the valuation resulting would be so prejudicial as to be paramount to the taking of the owner's property without due process of law and should require a reversal and remand in order to protect the landowner's Constitutional rights under the due process clause in a condemnation proceeding. If, as in the United States v. Ham case, supra, the government was deprived of a fair, complete and adequate hearing, surely, on a like basis, a landowner would likewise be deprived of a full, complete and adequate hearing by a State court—particularly, in view of the Federal Constitutional right afforded the landowner, even in condemnation proceedings. Any other conclusion, would vitiate the individual right to own property, free from the taking by a sovereignty without just and fair compensation. Thus, this individual right to own property, which sprang from the Magna Charta and reiterated in our Federal Constitution could be nullified by State Courts unless protected by the due process clause of our Federal Constitution.*

Clearly, the questions presented are of importance in the preservation of property rights of the individual when confronted by condemnation proceedings instituted by a sovereignty, whether Federal or state, or any other agency possessing the power to condemn private property for public uses.

The principles involved turn on fundamental constitutional concepts regarding the individual right to own, use and enjoy

property and what constitutes a fair exercise of due process in conducting condemnation proceedings in a state court. The questions strike at the very roots of our constitutional concepts of the right of the individual to own property subject only to a taking by a taking authority by due process of law as accorded the individual by the constitutional guarantees contemplated by constitutional declarations.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

SIMPSON, CLAYTON & FULLINGIM
AMARILLO, TEXAS

CLEO G. CLAYTON, JR.
210 FIRST NAT. BANK BLDG.
AMARILLO, TEXAS

Attorneys for H. L. Cravens and Bill P. Yeager

PROOF OF SERVICE

I, CLEO G. CLAYTON, JR., one of the attorneys for Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 19th day of September, 1958, I served copies of the foregoing Petition for Writ of Certiorari on Respondent by mailing copies thereof in duly addressed envelope, with adequate postage prepaid, duly deposited in the depository for the United States mails, to its attorneys of record as follows:

J. Edgar Haley
Gibson, Ochsner, Harlan, Kinney & Morris
Amarillo Building
Amarillo, Texas

CLEO G. CLAYTON, JR.

APPENDIX

CLERK'S CERTIFICATION

I, George H. Templin, Clerk of the Supreme Court of Texas, do hereby certify that in cause No. A-6787, styled *Cravens et al v. City of Amarillo* the action of the Supreme Court was as follows:

(a) On the 4th day of June, 1958, the Court *Dismissed for want of jurisdiction*, without notation, Petitioners' Application for Writ of Error;

(b) On the 25th day of June, 1958, the Court overruled Petitioners' Motion for Rehearing on the Application for Writ of Error filed.

IN TESTIMONY WHEREOF, witness my hand and the seal of the Supreme Court of Texas in the City of Austin, this 6th day of September, 1958.

(SEAL)

/s/ GEORGE H. TEMPLIN
George H. Templin, Clerk
Supreme Court of Texas

FILE COPY

Supreme Court, U.S.
FILED
OCT 15 1958
JOHN T. FEY, Clerk

In the

Supreme Court of the United States

OCTOBER TERM, 1958

No. 389

H. L. CRAVENS and BILL P. YEAGER,
Petitioners,

v.

CITY OF AMARILLO,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

W. W. GIBSON,
and
J. HADLEY EDGAR, JR.,
630 Amarillo Building,
Amarillo, Texas,
Attorneys for Respondent.

WARREN LAW, INC. — 1207 HORD STREET — DALLAS — RI 1-8711

SUBJECT INDEX

	Page
Apologia	1
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement of the Case	3
Reasons for Denying the Writ	4
I. Jurisdictional Reasons	
A. The Petition for Writ of Certiorari should be denied because Petitioners have totally failed to indicate in their Petition that the constitutional grounds now urged are properly before this Court	4
B. The Court of Civil Appeals decided against Petitioners on an adequate and independent non-federal ground determined by local law	4
C. The Supreme Court of Texas, in dismissing Petitioners' Application for Writ of Error to that Court, with the notation "Writ Dismissed for Want of Jurisdiction," obviously and correctly concluded that Petitioners had not preserved their alleged error from the Court of Civil Appeals	5
D. Petitioners failed to preserve any assertions of error in their Motion for Rehearing before the Supreme Court of Texas	7
E. Assuming, however, that the trial court did in fact reject testimony and that Petitioners have procedurally preserved their right to complain at this appellate level, such rejection was properly made on adequate and independent non-federal grounds	9

Page

II. Meritorious Reasons

Preliminary Statement 10

A. Since the Court of Civil Appeals correctly held that the trial court did not in fact exclude any of Homer R. Robbins' testimony, Petitioners' charges are contrary to the face of the record and without merit 11

Argument and Authorities 20

B. The Court of Civil Appeals correctly refused to disturb the trial court's sound and discretionary exclusion of Homer R. Robbins' opinion of the subject land's value based upon the capitalization of rental income from a hypothetical, non-existent housing development 21

Statement 21

Argument and Authorities 24

C. The Court of Civil Appeals correctly held that the trial court did not deprive Petitioners of their property without due process of law under the Fourteenth Amendment to the Constitution of the United States 28

Statement, Argument and Authorities 28

Petitioners' Cases Distinguished 33

Conclusion 33

Certificate of Service 34

Page

Adams v. Russell, 229 U. S. 353, 33 S. Ct. 846, 57 L. Ed. 1224 (1913) 9

Buck v. California, 343 U. S. 99, 72 S. Ct. 502, 96 L. Ed. 775, 781 (1952) 9

City of Austin v. Cannizzo, 267 S. W. 2d 808, 814 (Tex. Sup. Ct., 1954) 29

Cuyahoga River Power Company v. Northern Realty Co., 244 U. S. 300, 37 S. Ct. 643, 61 L. Ed. 1153, 1155-56 (1917) 9

Dale Truck Line v. R. & M. Wells Servicing and Drilling Co., 286 S. W. 2d 446 (Galveston Civ. App., 1956, writ ref., n.r.e.) 20

Greenfield v. City of Philadelphia, 282 Pa. 344, 127 Atl. 768 (1928) 25

Greenspan v. Norfolk County, 264 Mass. 9, 161 N. E. 894 (1928) 24

In re Blackwell's Island Bridge in City of New York, 118 App. Div. 272, 103 N. Y. Supp. 441 (1907) 25

Lynch v. New York, 293 U. S. 52, 55 S. Ct. 16, 79 L. Ed. 191 (1934) 9

Premier Petroleum Co. v. Box, 257 S. W. 2d 105 (Tex. Sup. Ct., 1953) 6, 7

Roberts v. New York, 295 U. S. 264, 55 S. Ct. 689, 79 L. Ed. 1429 at 1435-1436 (1935) 31

Rule 55, Texas Rules of Civil Procedure 8

Rule 469(c), Texas Rules of Civil Procedure 5, 7

Rule 515, Texas Rules of Civil Procedure 7

Southwestern Bell Telephone Co. v. Oklahoma, 303 U. S. 206, 58 S. Ct. 528, 82 L. Ed. 751, 755 (1938) 10

State v. Carpenter, 89 S. W. 2d 194 (Tex. Comm. App., 1936), opinion adopted by the Supreme Court 24

	Page
Stembridge v. Georgia, 343 U. S. 541, 72 S. Ct. 834, 96 L. Ed. 1130, 1134 (1952)	9
Title 52, Eminent Domain (Articles 3264-3271, inclusive), Texas Civil Statutes	28
United States v. 25.406 Acres of Land, 172 F. 2d 990 (4th Cir., 1949), cert. denied, 337 U. S. 931, 93 L. Ed. 1738 (1949)	26, 28
1 Nichols, Eminent Domain (3rd Ed.) 364-365, Sec. 4.106(2)	30
28 U. S. C. A., Section 1257(c)	2
28 U. S. C. A., Sup. Ct. R. 23	4, 10

In the

Supreme Court of the United States

OCTOBER TERM, 1958

No. 389

H. L. CRAVENS and BILL P. YEAGER,
Petitioners,

v.

CITY OF AMARILLO,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Supreme Court of the United States:

APOLOGIA

Respondent apologizes for the length of this reply brief, but contends that the points raised in the Petition for Writ of Certiorari are not properly before this Court. It has been necessary, therefore, to include Appendices A through D (pages 35 to 70), all of which should have appeared in the Petition for Writ of Certiorari.

To maintain continuity, Respondent has replied to the Petition *ad seriatim*.

OPINIONS BELOW

Under this capition in the Petition for Writ of Certiorari the statements made are substantially correct except that the trial court merely entered a written judgment and did not render an opinion in this cause. The trial court's judgment is a part of the record accompanying the Petition. Since Petitioners neglected to include the opinion of the Court of Civil Appeals for the Seventh Judicial District of Texas, sitting at Amarillo, Respondent has included it herein as Appendix B (pages 43 to 55).

JURISDICTION

Respondent denies that the jurisdiction of this Court has been invoked under *28 U. S. C. A., Section 1257(c)*. The basis for this statement will be briefly discussed in connection with Respondent's contention that the Writ of Certiorari should be denied on jurisdictional grounds.

QUESTIONS PRESENTED

Respondent submits that Petitioners have not been denied due process under the Fourteenth Amendment to the United States Constitution and further contends that:

1. The Petition for Writ of Certiorari does not show that the constitutional grounds urged therein are properly before this Court.

2. The Court of Civil Appeals for the Seventh Supreme Judicial District of Texas held against Petitioners on an

adequate and independent non-federal ground determined by local law.

3. The Supreme Court of Texas, in dismissing Petitioners' Application for Writ of Error to that Court, with the notation "Writ Dismissed for Want of Jurisdiction" obviously and correctly concluded that Petitioners had not properly preserved their alleged error from the Court of Civil Appeals.

STATUTE INVOLVED

Respondent submits that the "due process" clause of the Fourteenth Amendment to the United States Constitution is not involved in the proper determination of this case.

STATEMENT OF THE CASE

Petitioners' Statement of the Case (Petition, p. 3) is largely argumentative and based on conclusions rather than fact. The opinion of the Court of Civil Appeals (Appendix B, pages 43 to 55), reported at *309 S. W. 2d 903*, states the case accurately and objectively. Respondent points out that the "Statement of the Case" in the Petition for Writ of Certiorari has failed to comply with *Rule 23, Paragraph 1, subparagraph (f)* of this Court. Such failure will be emphasized in the following few paragraphs.

REASONS FOR DENYING THE WRIT

I. Jurisdictional Reasons.

A. The Petition for Writ of Certiorari should be denied because Petitioners have totally failed to indicate in their Petition that the constitutional grounds now urged are properly before this Court.

The Petition for Writ of Certiorari patently discloses that Petitioners have wholly failed to comply with *Rule 23, Par. 1 (f)* of this Court *(Sup. Ct. R. 23, 28 U. S. C. A.)*, which reads as follows:

> "If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

B. The Court of Civil Appeals decided against Petitioners on an adequate and independent non-federal ground determined by local law.

C. The Supreme Court of Texas, in dismissing Petitioners' Application for Writ of Error to that Court, with the notation "Writ Dismissed for Want of Jurisdiction", obviously and correctly concluded that Petitioners had not preserved their alleged error from the Court of Civil Appeals.

For sake of brevity, subheadings B. and C. are discussed together below.

Petitioners, in appealing from a jury trial, had twenty-six points of error to the Court of Civil Appeals (Appendix A, pages 35 to 41). The Court of Civil Appeals overruled all of these points of error (Appendix B, pages 43 to 55). Petitioners, in their Motion for Rehearing in the Court of Civil Appeals, again urged each of their prior points (Appendix C, pages 57 to 66). In their Application for Writ of Error to the Texas Supreme Court, Petitioners reduced their number of points to thirteen (Appendix D, pages 67 to 70), thus abandoning all prior points except those relating to the witness Robbins and constitutional "due process." Those thirteen points were the only points of error which the Texas Supreme Court could consider. *Rule 469 (c), Texas Rules of Civil Procedure* states:

> "The fact that the docket of the Supreme Court is overcrowded makes it imperative that applications for writs of error be as brief as possible. The attorneys are urged to co-operate with the Court in this respect, in order to reduce the work of the Court. The respondent is urged to file a reply.

"The application for writ of error shall be addressed to 'The Supreme Court of Texas,' and shall state the name of the party or parties applying for the writ. The parties shall be designated as 'Petitioner' and 'Respondent'. The application shall contain the following:

"• • •

"(c) Points of Error. The points of error relied upon, separately numbered, shall be stated in short form and without argument and be germane to some assignment of error in the motion for new trial in the trial court, or otherwise saved in the statement of points as authorized by the rules, and likewise assigned as error in the motion for rehearing in the Court of Civil Appeals, and where Rule 377-a has been employed, saved in the statement there authorized. If the ruling complained of originated in the Court of Civil Appeals, it must also be assigned as error in the motion for rehearing in said court."

See also *Premier Petroleum Co. v. Box*, 257 S. W. 2d 105 (*Tex. Sup. Ct., 1953*).

Petitioners' assignments of error in the Texas Supreme Court (Appendix D, pages 67 to 70), complained of the Court of Civil Appeals' action in upholding the rejection of the witness Homer Robbins' testimony by the trial court. But, Petitioners have consistently overlooked the fact that the Court of Civil Appeals concluded (Appendix B, page 47):

1. There was no support in the record that Robbins' testimony was rejected in the trial court.

2. If any such evidence was rejected, it was on an adequate and independent non-federal ground.

Petitioners claim that the trial court erred in rejecting Robbins' testimony and have only complained of the Court of Civil Appeals' upholding the trial court's action. However, the Court of Civil Appeals did not first hold that the testimony was properly excluded but rather held that the charges of excluded evidence were not supported by the record. Appendices C and D clearly show that Petitioners have *never* assigned any error to that ruling. Thus the Supreme Court of Texas had no alternative but to dismiss their Writ of Error for Want of Jurisdiction. See last sentence of *Rule 469 (c), Texas Rules of Civil Procedure, supra*, and *Premier Petroleum Co. vs Box, 257 S. W. 2d 105 (Tex. Sup. Ct., 1953)*.

Since Petitioners have not preserved any alleged error in the Supreme Court of Texas, Respondent is frankly at a loss to see how they can complain in this Court of alleged error in the trial court which the Court of Civil Appeals held did not in fact occur.

D. Petitioners failed to preserve any assertions of error in their Motion for Rehearing before the Supreme Court of Texas.

Rule 515, Texas Rules of Civil Procedure, reads as follows:

> "A motion for rehearing may be filed with the clerk of the court within fifteen days after the date of rendition of the judgment or decision of the court or the order refusing or dismissing an application for writ of error, whether such date be in the same or a succeeding term of such court. In exceptional cases, if

> the ends of justice require, the court may shorten the time within which the motion may be filed or even deny the right to file it altogether. *The grounds relied upon for the rehearing shall be distinctly specified in the motion.* The motion shall give the name and residence of the counsel of the opposing party if known, and if not known, the name and residence as shown in the record. The party filing such motion shall deliver or mail to each opposing party, or his attorney of record, a true copy of such motion, and shall note on the motion so filed with the clerk that such copies have been so furnished. Upon his failure to do so, he shall accompany his motion with or furnish to the clerk on his request a sufficient number of duplicates or copies thereof for the clerk to use in complying with the provisions of Rule 516. Failure to supply such copies on request of the clerk may result in dismissal of the motion. As amended by order of Sept. 20, 1941, effective Dec. 31, 1941; and by order of Oct. 12, 1949, effective March 1, 1950." (Emphasis added.)

Petitioners' Motion for Rehearing is not appended to their Petition for Writ of Certiorari but Respondent understands that it was sent to the Clerk of this Court as part of the record.

After a study of a copy of the Motion for Rehearing, Respondent believes that *Rule 53, Texas Rules of Civil Procedure*, *supra*, was totally disregarded. The Motion, in essence, was nothing more than Petitioners' nebulous conclusions concerning the power of eminent domain and its coexistence with our United States Constitution. Nowhere does it distinctly set forth the grounds relied upon for a rehearing in the Supreme Court of Texas.

E. Assuming, however, that the trial court did in fact reject testimony and that Petitioners have procedurally preserved their right to complain at this appellate level, such rejection was properly made on adequate and independent non-federal grounds.

The Court's attention is directed to Appendix B, page 47 where the Court of Civil Appeals held that the charges relating to the rejection of Robbins' testimony by the trial court were not supported by the record, but in any event, testimony of a speculative and conjectural nature was properly excluded.

When a state court decides a case on an adequate and independent non-federal basis, this Court will not review federal questions ancillary to the state court's decision. *Cuyahoga River Power Company v. Northern Realty Co., 244 U. S. 300, 37 S. Ct. 643, 61 L. Ed. 1153, 1155-56 (1917); Stembridge v. Georgia, 343 U. S. 541, 72 S. Ct. 834, 96 L. Ed. 1130, 1134 (1952); Ruck v. California, 343 U. S. 99, 72 S. Ct. 502, 96 L. Ed. 775, 781 (1952).* Jurisdiction cannot attach upon a mere surmise that the state court's decision turned upon a federal question. *Lynch v. New York, 293 U. S. 52, 55 S. Ct. 16, 79 L. Ed. 191 (1934)* and *Adams v. Russell, 229 U. S. 353, 33 S. Ct. 846, 57 L. Ed 1223 (1913).*

As this Court stated in *Lynch v. New York, 293 U. S. 52, 55 S. Ct. 16, 79 L. Ed. 191 at 193 (1934):*

> "It is essential to the jurisdiction of this court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a

> federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that judgment as rendered could not have been given without deciding it. (Citing cases.) • • • Where the judgment of a state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this court will not take jurisdiction. (Citing cases)."

See also *Southwestern Bell Telephone Co. v. Oklahoma, 303 U. S. 206, 58 S. Ct. 528, 82 L. Ed. 751, 755 (1938).*

Assuming that the questions presented in Petitioners' Petition for Writ of Certiorari are actually raised and properly preserved, Respondent submits that the Court of Civil Appeals' holding thereon (Appendix B, page 47) is based on an independent and adequate non-federal ground.

For each of the above jurisdictional reasons, Respondent urges that the Petition for Writ of Certiorari be denied.

II. Meritorious Reasons.

PRELIMINARY STATEMENT

Petitioners have petitioned this Court for Writ of Certiorari under Supreme Court Rule 23 *(28 U. S. C. A.)* which does not require a printed record. Respondent must refer to portions of the record to show this Court the fallacy of Petitioners' arguments. Therefore, the Statement of Facts in the trial court will be referred to as "S. F." and the

Transcript of the trial court proceedings will be designated as "Tr."

Respondent assumes that Petitioners are asserting in this Court their Points One through Nine and Point Thirteen as contained in their Application for Writ of Error in the Texas Supreme Court (Appendix D, pages 67 to 70).

A. Since the Court of Civil Appeals correctly held that the trial court did not in fact exclude any of Homer R. Robbins' testimony, Petitioners' charges are contrary to the face of the record and without merit.

STATEMENT

Since Petitioners' complaints relate solely to the alleged rejection of certain testimony offered through their witness, Homer R. Robbins, Respondent will attempt to assist the Court on certain matters which will arise in the statements to follow by referring the Court to the *method* of valuation which Homer R. Robbins used. It should be emphasized that the following testimony was before the jury (S. F. 193, 194):

> "One of the many methods used which I have used in my many places in the last few years has been the capitalization and the residual technique.
>
> "I mean by that it is taking the plan that the property would have been developed from—let me explain a little before I go into that.
>
> "It is the same thing as appraising a farm. We go out to the farm or ranch and estimate the carrying

capacity or the earning capacity in crop and what they will produce in order to ferret out the value that is necessary to get to it.

"In the same way this is handled. You take that and you just *assume* that you have got housing—we will build houses on your plat and you capitalize those—it is *assumed* there that you would have three houses to each acre. That is allowing good facing for your streets and alleys and that a multiple unit would be * * *. The capitalization with the residual method is handled every day in the same manner that I want to handle this. You don't assume, you have to *estimate* as I tried to explain—when you are farming or appraising farm land, you naturally have to estimate that you're going to get 15 bushels of wheat or 2 bales of cotton in order to fix your estimated value on the land."

He again stated (S. F. 195):

"Then I take the gross income from the houses and *project* as I have in the past—maybe I will have 100 houses or 200 houses—but I take the gross income and in order to get the residual method, I first *figure* out what is the cost of operating these houses, the management, the insurance and taxes, and any other expenses in connection with the cost of operating that house.

"Then I take the cost of the house(s) and I *select* a capitalization rate of whatever would be justified in that particular area, plus the depreciation rate and multiply that by the cost of the houses.

"That gives the amount of interest. That is subtracted, after you have *set up* a gross income less your vacancies and credit loss, but you get your effective gross income, and subtract that amount from that.

"Then your interest—we will just *say* it would be 10% of the amount of the cost of producing the houses and subtract that from the balance of your gross

income and the balance of that then, would be residual to the land.

"It is the remaining part of the income that would be considered for the land.

"Then we *take* that same capitalization rate and capitalize that amount which gives us the *estimated* value of the land." (Emphasis added.)

and again testified (S. F. 243):

"Q. You have testified before this Court, and you have testified before this Jury, that is your opinion there is only one way to arrive at the value of this property, and that is not by the use of comparable sales?

"A. Yes, sir."

This witness also told the jury that he did not consider comparable sales because he used the "residual" method and observed that "the value is set strictly by the residual method." (S. F. 258.)

The Court of Civil Appeals in its opinion below (Appendix B, page 47), actually makes two holdings concerning Homer R. Robbins' testimony under consideration. First, the Court holds that Robbins' testimony was not excluded from the jury's consideration as charged. Second, the Court holds that even if Robbins' testimony had been rejected, the trial court would have been justified in doing so on the ground that it is within the province of the trial court to reject evidence which is remote, speculative and conjectural.

Petitioners' complaints to this Court relate solely to the proposition that the trial court excluded Homer R. Robbins' testimony. As the Court of Civil Appeals correctly

concluded, the record shows on its face that the testimony which Petitioners allege as having been rejected was *actually admitted into evidence and before the jury* (Appendix B, Page 47).

The following excerpts from the record patently demonstrate that there was no such exclusion as charged:

1. Petitioners complain of an alleged rejection of Robbins' testimony to the effect that in his opinion the subject land had a market value of $850.00 per acre as based upon the capitalization of its rental value because of its adaptability to subdivision uses. He testified (S. F. 191):

> "That is the reason we decided the highest and best use in my appraisal was for the development for —to be divided into a subdivision, I might say—for some type of housing."

Petitioners' counsel asked the witness Robbins (S. F. 210):

> "All right; will you give us the income approach, regardless of value, regardless of what Mr. Ravens and Mr. Yeager were going to do with it; you said its highest and best use is subdevelopment."

Mr. Robbins' opinion as to the adaptability of the land to subdivision uses is implicit in the balance of his testimony. He then told the jury that in his opinion the land had a market value of $850.00 per acre (S. F. 237) and that (S. F. 258):

> "They (comparable sales) only prove it (market value). *The value is set strictly by the residual method.*" (Emphasis added.)

2. Petitioners charge the trial court with the exclusion of Homer Robbins' testimony to the effect that in his opinion the subject land was economically adaptable for subdivision uses. However, the record shows that the witness Robbins testified in great detail without interruption about the economic conditions surrounding the subject property including the size, population, expansion, industrial development, and the development of suburban areas in and around the City of Amarillo (S. F. 190-193). His narration continued until he started capitalizing the value of hypothetical houses on the subject land (S. F. 193). Later, both the witness Robbins and his interrogator testified about the economic development of the land (S. F. 208).

3. Petitioners allege that the trial court excluded the testimony of Homer Robbins' explaining why, in his opinion, the subject land was adaptable to subdivision uses. Without unduly encumbering this brief, we refer the Court to the testimony previously referred to in the first paragraph under this Statement and the two preceding numbered paragraphs. All of these references show why Homer Robbins thought the subject land was adaptable to subdivision uses. Further, Respondent made no objection to this testimony and, of course, the trial court did not exclude it. At the conclusion of his lengthy narration, Robbins stated (S. F. 191):

> "That is the reason we decided the highest and best use * * * was for division into a subdivision."

4. Petitioners assert that the trial court refused to permit Robbins to explain why, in his opinion, the subject land

possessed a market value based upon its adaptability for subdivision purposes. The preceding numbered paragraphs have already shown without contradiction that Robbins testified before the jury that he thought the highest and best use of the subject property was for subdivision purposes. He testified to that opinion without objection and consequently the trial court did not exclude it. Rather than repeat this witness' testimony Respondent will merely refer the Court to the preceding references of the record which show that he made many statements before the jury without objection pertaining to his opinion that the subject land possessed a market value of $850.00 per acre based upon its adaptability to subdivision purposes.

5. Petitioners complain that the trial court erred in excluding the testimony of Homer Robbins as to why, in his opinion, the appraisers for Respondent were not placing a market value on the subject property according to its highest and best use. The record, however, reflects the following occurence (S. F. 207-208):

> "Q. (By Mr. Clayton) So, if an appraiser comes in here and tells this Jury that the reason he can't put any value on this property for subdivision purposes is because the VA won't make any loans on it or loan commitments, and for that reason he has to consider it dry farming, has he been fair in appraising this property from the land owner's standpoint?
>
> "A. I would say not. If that hadn't been submitted to the FHA or VA and turned down they couldn't say whether they could or not.
>
> "Q. Would you say that would be a fair appraisal when he makes that statement to the Jury?
>
> "A. No.

"Q. Do you find any relationship at all to the success or failure of this for development purposes by virtue of the development that has gone around the Air Field until this condemnation became known?

"A. Yes; the development there is a leading point there. It led right in to this section for development because of its position there.

"Q. From the history of the economics the development of land and the growth and flow of people, isn't it a matter of common knowledge that the commercial development around there would ultimately, as a matter of course of human events, result in some of this area down and around it become a factor for residential purposes, considering the fact that there are some ten to fifteen thousand people here that need some place to live?

"A. Where people go they make value."

6. Petitioners allege that the trial court erred in excluding Homer Robbins' testimony to the effect that in his opinion the *method* of "capitalization of rental value" as used generally by appraisers would show fallacy in the conclusions of Respondent's witnesses. Since Petitioners have not seen fit to point out to this Court the trial court's ruling which they assign as error, we must indulge in the assumption that "the method of capitalization of rental value" as used by appraisers refers to Homer Robbins' "residual capitalization method." Respondent has previously in this brief excerpted Homer Robbins' explanation to the jury of his "residual capitalization method" (S. F. 191-192). Robbins answered to the following questions (S. F. 220):

"Q. (By Mr. Kinney) Mr. Robbins, as I understand your testimony, the method which you have indicated

here is in your opinion the only method to arrive at the value of this land; and that is the method which you have used in arriving at the value you placed on it?

"A. I might say it is the only approach I use on property, whether it is downtown or any place, and it is the one generally used by trained appraisers—

"Q. That is the only approach you have used?

"A. Yes."

In spite of Robbins' emphatic statement that his "capitalization approach" was the only approach, Petitioners' counsel asked him (S. F. 236):

"Q. (By Mr. Clayton) Without any consideration of capitalization approach, excluding that completely, can you tell me whether or not you have reached an opinion as to what the fair cash market value of this property was per acre as of June 21st, 1956?"

Homer Robbins then replied (S. F. 237):

"A. $850.00 per acre."

In spite of Robbins own remonstations, he testified that the value of the land was $850.00 an acre and based his opinion on a method other than his "capitalization approach" which was entirely inconsistent with his other testimony. Since Robbins based his opinion on something other than a "capitalization approach," Respondent is frankly at a loss to understand how Petitioners can complain that the capitalization method of rental value would show fallacy in the conclusion of Petitioners' witness. Robbins had previously testified that there was not a "comparable" sale in the whole state of Texas that would assist

him in arriving at the value of the subject land (S. F. 203). Yet, he later testified before the jury to six sales that he considered "comparable" (S. F. 237) in valuing the subject land at $850.00 per acre. This witness also testified that air bases and air fields in other areas of the state have residential areas abutting them and that if an appraiser told the jury that the property had no subdivision value because the VA would not make any loans or loan commitments upon it, that such an appraiser was not being fair in appraising the property (S. F. 207-208). Robbins also testified under oath that his method was the only one generally used by trained appraisers (S. F. 220).

Frankly, Respondent does not understand how Petitioners can state that they were denied an opportunity to show any alleged fallacy in the methods of appraisal used by Respondent's witnesses.

7. Petitioners complain of the trial court's refusal to allow Homer Robbins' testimony that in his opinion the subject property had a market value of $833.00 to $850.00 per acre because of its adaptability to subdivision purposes. The record on the other hand conclusively shows that Homer Robbins testified before the jury that in his opinion the subject land had a market value of $850.00 per acre (S. F. 237). He then told the jury that his opinion of $850.00 an acre was based on his "residual method" (S. F. 258):

> "Q. * * * Now what is the next reason you can give this jury and yourself that you did not consider any of those [comparable] sales?
>
> "A. *Because I used the residual method.*

"Q. That is because you do not consider any comparables anywhere will evidence to you the value of this property?

"A. They only prove it. *The value is set strictly by the residual method.*" (Emphasis added.)

Respondent will show this Court in the next subheading that Homer Robbins' "residual capitalization method" is inadmissible under the facts of this case. However, assuming for purposes of argument that such a method might have been proper, the above testimony establishes without doubt that Homer Robbins did opine the value of the subject land to be $850.00 per acre and that *he based his opinion of value upon his "residual" method.* Therefore, there can be no merit to Petitioners' contentions that Homer Robbins was not allowed to testify to his opinion that the subject property had a market value of $833.00 to $850.00 per acre because of its adaptability to subdivision purposes.

ARGUMENT AND AUTHORITIES

Respondent will not further encumber this brief except to say that the record itself conclusively establishes that every shred of the alleged "rejected evidence" was actually in evidence before the jury. There can be no merit to Petitioners' "rejected evidence contention" when the record shows to the contrary.

In *Dale Truck Line v. R. & M. Wells Servicing and Drilling Co., 286 S. W. 2d 446 (Galveston Civ. App., 1956, writ ref., n. r. e.)*, the court held at Page 450:

"• • • Plaintiff attempts to supply this gap in the proof by certain statements and assumptions in its

brief, but these are without support in the Statement of Facts and, of course, we cannot consider them."

The Court of Civil Appeals most correctly recognized this principle of law and properly overruled Petitioners' claims because they were not supported by the record.

The subheading immediately following is submitted only in the event this Court determines that the trial court did in fact exclude the evidence to which Petitioners' assertions are germane. The submission of this subheading is made without waiving objection to its consideration.

B. The Court of Civil Appeals correctly refused to disturb the trial court's sound and discretionary exclusion of Homer R. Robbins' opinion of the subject land's value based upon the capitalization of rental income from a hypothetical, non-existent housing development.

STATEMENT

Petitioners have challenged (See Appendix D, pages 67 to 70) only that part of the Court of Civil Appeals' opinion concerning the "excluded" testimony of Homer Robbins. Since that testimony was not in fact excluded, Petitioners' complaints become moot.

However, Petitioners have erroneously assumed that Robbins' testimony was excluded and then proceeded upon the theory that the exclusion was contrary to our local rules of evidence and the Constitution of the United States. For purpose of argument only, Respondent will assume in this

subheading that the trial court refused to allow Robbins' opinion of $850.00 per acre to go before the jury.

To bring Robbins' testimony into focus, we must emphasize that the subject acreage is approximately 7½ miles from the City of Amarillo (S. F. 189), unimproved (S. F. 11), and has been farmed (S. F. 15). In fact, the acreage is surrounded on all sides by wheat farms (S. F. 15-16). The land is located between two highways, but separated from each of them by railroads, neither of which railroads abut the property. There is no road on the east, west, or south (S. F. 9). There is a passable caliche road twenty feet wide along the north side of the tract (S. F. 10). This road, the only means of ingress and egress, was ostensibly dedicated as such, but it was admitted upon trial that the third party dedicating it *did not own the land* upon which it was located (S. F. 181-182). Therefore, the subject acreage had no established access to a public road.

With the above testimony in the record, the witness Homer Robbins attempted to give an opinion of value based upon the following technique (S. F. 193-198, 208-209, 210-214, 216-218): (1) He would *estimate* the cost of constructing three houses per acre on subject land with the attendant costs of curbs, gutters, streets, alleys, lights, water, and gas; (2) Rent the houses at an *undetermined* figure to obtain *hypothetical* gross rent; (3) Subtract *hypothetical* management, vacancy, credit loss, taxes, and insurance costs from the *hypothetical* gross rent figure; (4) From the *hypothetical* net rent figure he would deduct

a *hypothetical* return on the investment in the *hypothetical* improvements leaving a *hypothetical* share of the *hypothetical* net rent attributable to land; (5) The *hypothetical* net rent attributable to the land would be capitalized at an *arbitrary* rate to obtain the "market" value of the land *after* subdivision. Thus, we have Homer Robbins' "residual capitalization" technique.

Respondent re-emphasizes that Petitioners were offering Robbins' testimony for the purpose of showing an opinion of value *after* the land was subdivided, rather than its present market value in its unsubdivided, unimproved state. Petitioners' counsel explained his offer of proof to the trial court in the following manner:

> "Mr. Clayton: Does the court prohibit me from asking if he had appraised it and taken all of the factors into consideration as to its being subdivided, he can't give me the value of the acreage *after* subdivision * * *." (S. F. 223.)

> "Mr. Clayton: * * * I do intend to ask him this question:

> "Mr. Robbins, you have made an extensive investigation of all comparables, the location of this land, the general characteristics of the use of the land in this city, as well as others for subdividing purposes; can you tell us what, *after* the cost of actually putting it into a residential subdivision has been deducted—can you give me then, your opinion as to what the value per acre of this land would be *after* all costs of developing and putting in roads of ingress and egress, and everything necessary to adapt it to residential uses; can you give me the value per acre? * * *." (S. F. 224.)

> "Q. (By Mr. Clayton): What would the value per acre be, *after* all of that cost and expenditure had been utilized and the money spent?" (S. F. 225.) (Emphasis added.)

As Respondent has shown in the preceding subheading, Robbins told the jury that his "residual" method produced an opinion of value of $850.00 per acre. However, at this point in the testimony, Respondent's objection to such an opinion because it was speculative, fanciful, and conjectural (S. F. 197, 198) was sustained (S. F. 222-223).

ARGUMENT AND AUTHORITIES

Under the record, the "residual capitalization technique" was properly rejected by the trial court.

In *State v. Carpenter, 89 S. W. 2d 194 (Tex. Comm. App., 1936), opinion adopted by the Supreme Court*, it was said at page 200:

> "Evidence should be excluded relating to remote, speculative, and conjectural, uses, as well as injuries which are not reflected in the *present market value* of the property. See Worsham v. Ry. Co., 3 Willson, Civ. Cas. Ct. App. Sec. 425." (Emphasis added.)

An opinion of value in a condemnation suit based upon *non-existent rental income* is inadmissible under the facts of the case at bar. This rule was clearly and cogently expressed in *Greenspan v. Norfolk County, 264 Mass. 9, 161 N. E. 894 (1928)*, a condemnation case where the condemnee's witness was allowed to testify over objection to an opinion of value based upon capitalizing rental value of a hypothetical building upon the unimproved property be-

ing condemned. Just as in the case at bar, the witness testified that he arrived at his opinion by determining in his own mind the most advantageous type of building to erect upon the land and what in all probability that building would yield in the form of rental income. At *161 N. E. 894, 895*, the court reversed and remanded, and held:

> "• • • [E]vidence of the rental value if the land were improved by the erection of buildings for business purposes was inadmissible. *It was too prospective and indefinite in its nature to be competent evidence of the present value of the land not built on.* Burt v. Wigglesworth, 117 Mass. 302, 306, Gardner v. Brookline, 127 Mass. 358, 362 • • •.
>
> "The testimony to which the respondent excepted tended to fix a value estimated *not merely on a prospective development which could be made of the land if put on the market but as if such use actually existed at the date of taking.* • • • The motion to strike should have been granted • • •." (Emphasis added.)

See also *In re Blackwell's Island Bridge in City of New York, 118 App. Div. 272, 103 N. Y. Supp. 441 (1907)*, which held that the introduction of opinion evidence of rental value on hypothetical buildings on unimproved property caused reversible error.

The fallacy in Petitioners' argument has been that the subject acreage had *no* existing rental income. If the subject land were producing rental income, Respondent agrees that a proper method of appraisal would be to capitalize that income as a method of arriving at an opinion of "fair market value." This view was expressed in *Greenfield v. City of Philadelphia, 282 Pa. 344, 127 Atl. 768 (1928)*. In

that case the landowners' witnesses attempted to base their opinion of value on an unimproved tract of land by capitalizing the rental value of a non-existent office building erected thereon. The trial court's refusal to admit such testimony was upheld at *127 Atl. 768, 772:*

> "* * * While it may be true that the ability to readily rent property at advantageous and profitable figures is an element entering into its market value and one that should be taken into account by witnesses in fixing that value, nevertheless it is somewhat difficult to see how an opinion as to the market value of office space per square foot in a building not yet erected can have any substantial relevancy to the market value, thereby meaning fair selling price, of the land. There necessarily would be so many factors to be taken into account in determining what the net avails would be to the owner from the rents that the result reached from testimony as to what the rentals might be *would be speculative in the extreme.* * * * Net rentals of an entire building might be of some assistance in determining its value from the income producing standpoint, but to permit a witness to testify as to the market value of office space of a building on the lot in question, yet to be occupied by tenants, or to market value of office space of other buildings in the vicinity, *would get the jury into the wildest realms of speculation on the question of the market value of the* property * * *." (Emphasis added.)

Petitioners would be far more realistic and candid with this Court if they had cited *United States v. 25.406 Acres of land, 172 F. 2d 990 (4th Cir., 1949), cert. denied, 337 U. S. 931, 93 L. Ed. 1738 (1949).* In that case the Government condemned an unimproved tract of land located in an apartment district of Washington, D. C., for the site of a

Veterans Hospital. The evidence showed that the plans for eight apartment buildings had been drawn; that definite and firm arrangements had already been made to finance the undertaking and that a construction firm would have commenced construction within thirty days had it not been for the condemnation proceedings. In that case the trial court admitted testimony of the estimated income to be derived from the property *only after it had been established that the property was suitable for such a development and that the above preparations had been completed.* At page 992 the court stated:

> "The testimony in question, therefore, related not to the nebulous cost of constructions of a vague hypothetical project and the estimated income to be derived therefrom, *but to the cost and expected income of a project which, according to the evidence,* was definitely in the process of achievement." (Emphasis added.)

The court said at page 993:

> "Of course, an expert witness may not under the guise of giving the basis of his opinion, lug in evidence which is incompetent or irrelevant, nor should he be permitted to go into the grounds of his opinion in such way as to confuse or mislead the Jury; but the scope of such examination is a matter properly committed *to the sound discretion of the trial judge*, who should be careful, as was the trial judge here, to see that false issues are not suggested to the Jury and that they are not otherwise mislead." (Emphasis added.)

And again at page 994:

> *"We do not mean to say, of course, that an expert witness should be allowed to roam at large in the realms of fancy and testify at lengths about hypothe-*

tical developments and mythical income to be realized therefrom. When this is attempted, it should be firmly suppressed because of its tendency to mislead and confuse and the waste of time involved. Nothing of this sort, however, is involved here." (Emphasis added.)

The above language leaves no doubt that the court in *United States v. 25,406 Acres of Land, supra*, would have upheld the exclusion of capitalization of *non-existent* rental value if it had been confronted with the facts at bar.

Since Petitioners in the case at bar had no established access to their land, its location and proximity were all factors that the trial court could consider in properly concluding that the pyramids of hypothetical gyrations of Homer Robbins could produce nothing but speculative results tending to mislead the jury.

C. The Court of Civil Appeals correctly held that the trial court did not deprive Petitioners of their property without due process of law under the Fourteenth Amendment to the Constitution of the United States.

STATEMENT, ARGUMENT AND AUTHORITIES

The essence of Petitioners' complaint is that the trial court's rulings on the items of evidence pertaining to the witness Homer Robbins deprived them "of a fair and impartial trial" and "due process of law" under the United States Constitution. There is no merit to these contentions.

Title 52, Eminent Domain (Articles 3264-3271, inclusive), TEXAS CIVIL STATUTES, provides for the acquisition of private property for public use. The measure of

damages is stated in Article 3265(2), TEXAS CIVIL STATUTES, as follows:

> "When the whole of a tract or parcel of a person's real estate is condemned, the damages to which he shall be entitled shall be the market value of the property in the market where it is located *at the time of the hearing.*" (Emphasis added.)

In *City of Austin v. Cannizzo, 267 S. W. 2d 808, 814 (Tex. Sup. Ct. 1954)*, the following instruction and definition of the term "market value" was approved *in the exact language in which it was submitted to the jury in the cause at bar* (Tr. 29):

> "You are instructed that the term 'market value' is the price which the property would bring when it is offered for sale by one who desires, but is not obligated to sell, and is bought by one who is under no necessity of buying it, *taking into consideration all of the uses to which it is reasonably adaptable and for which it either is or in all reasonable probability will become available within the reasonable future.*" (Emphasis added.)

Petitioners complain that the trial court denied them the right to testify to their opinion of the subject land's market value, based upon its reasonable adaptability for subdivision purposes. In the face of the record, this is a startling statement. Let us examine it.

1. Petitioners' witness, Homer Robbins, testified several times that the highest and best use of the subject property was for residential subdivision (S. F. 191-192, 208, 210) and based his opinion of value upon that proposition.

2. *The record stands undisputed* that Respondent never objected to any question calling for an opinion that the subject property was adaptable to subdivision use.

3. The only objections which Respondent interposed were to some of the *methods* by which Petitioners sought to establish market value, but this is a *far different* matter than if the trial court had refused to allow testimony concerning an opinion as to the property's highest and best use.

Respondent recognizes that any landowner whose property is being acquired by eminent domain is allowed to present testimony of the use to which his land is reasonably adaptable. For that reason, *Respondent did not object* to any questions propounded to Petitioners' witnesses which called for an opinion of the subject land's reasonable adaptability.

Petitioners have cited no cases to this Court holding that the rejection of evidence in a condemnation suit violates constitutional due process. On the other hand, Respondent has specifically referred to cases in the preceding subheading where the rejection of similar testimony has been upheld by our courts under the *general rules of evidence*. Those cases are adopted herein.

If the evidence is properly rejected under our general rules of evidence, no lack of due process is involved. This Court's attention is called to 1 Nichols, *EMINENT DOMAIN* (3rd Ed.) 361-365, Sec. 4.1061 (Due Process—Evidence—Upon hearing or trial by jury):

> "On the other hand, when the determination of damages in eminent domain proceedings is submitted to

a jury at a hearing conducted in the same manner as civil actions generally are tried, *the reasons which stand behind the rules of evidence as ordinarily enforced are equally applicable to the securing of a just verdict in proceedings of this character.* Accordingly it is well settled that, in the trial of land damage cases by a court and jury, the general rules of evidence apply and the improper exclusion or admission of evidence is ground for exception and for setting aside the verdict by the appellate court. Nevertheless, it is undoubtedly the fact that *in passing upon the admissibility of evidence of value more is left to the discretion of the trial court than in the determination of most other issues.* It follows that an exception to the admission or exclusion of evidence in a land damages case will ordinarily not be sustained except in case of manifest error. Moreover, the modern tendency to restrict the setting aside of verdicts for errors which do not cause substantial injustice is especially noticeable in land damages cases. Such cases usually involve a protracted and expensive trial, and, as a rule, are determined by the consideration of a mass of separate items of evidence." (Emphasis added.)

This Court, through Justice Cardozo, in *Roberts v. New York, 295 U. S. 264, 55 S. Ct. 689, 79 L. Ed. 1429 at 1435-1436 (1935)*, a condemnation case, stated that, *even assuming error*, the rejection of evidence was not necessarily a denial of due process:

"• • • Not every such mistake amounts to a denial of constitutional immunities, though the outcome is to give the owner less than he ought to have. *In condemnation proceedings as in lawsuits generally the Fourteenth Amendment is not a guaranty that a trial should be devoid of error.* West Ohio Gas Co. v. Public Utilities Commission, 294 U. S. 63, 70, ante, 761, 768, 55 S. Ct. 316. *To bring about a taking without due process of law by force of such a judgment, the error*

must be gross and obvious, coming close to the boundary of arbitrary action * * *.

"Enough for present purposes that when the hearing has been full and candid, there must ordinarily be a showing of something more far-reaching than one of dubious mistake in the appraisal of the evidence. Due process is a growth too sturdy to succumb to the infection of the least ingredient of error. *'It takes more than a possible misconstruction by a Court to make a case under the Fourteenth Amendments.'* Seattle, R. & S. R. Co. v. Washington, 231 U. S. 568, 570, 58 L. ed. 372, 374, 34 S. Ct. 185." (Emphasis added.)

In rejecting evidence in the cause at bar, the trial court cannot be charged with succumbing to "arbitrary action." On the contrary, the authorities previously cited clearly show that the alleged rejection of Homer R. Robbins' testimony was quite proper.

The trial court did not restrict the jury to "fair market value" based on *present* use, but instructed the jury that, in arriving at the "fair market value" of the subject land, they could consider all uses to which the property was *reasonably adaptable* (Tr. 29). This was in line with Petitioners' theory that the value of the property was greater than its value as a wheat field.

Respondent's witnesses valued the 60 acres of land as follows:

George Turnley	$ 9,612.80	(S. F. 28.)
Royce Gaut	12,000.00	(S. F. 84.)
Hugh Tull	150.00 per acre	(S. F. 137.)
L. C. Nesbitt	10,515.00	(S. F. 153.)

The jury returned a verdict of $15,000.00, or $250.00 per acre for the subject land (Tr. 29). This figure was greatly in excess of any amount testified to by any of Respondent's witnesses and demonstrates that the jury considered Petitioners' land more valuable than for its *present* agricultural use.

The above facts and authorities clearly show that the trial court did not deprive Petitioners of their property without constitutional due process of law.

PETITIONERS' CASES DISTINGUISHED

Since Petitioners have based their Writ for Certiorari on constitutional grounds, the cases which they cite in support of their Petition (pp. 4-8) are easily distinguishable—in none of those cases were constitutional issues discussed or resolved.

CONCLUSION

For each of the preceding reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

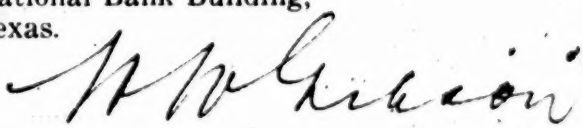
W. W. GIBSON,
and
J. HADLEY EDGAR, JR.,
630 Amarillo Building,
Amarillo, Texas,

Attorneys for Respondent.

CERTIFICATE OF SERVICE

Two copies of the foregoing Respondent's Brief in Opposition to Petitioners' Writ of Certiorari have been served this 13 day of October, 1958, on Petitioners' attorney of record by placing same in the United States mail, properly stamped and addressed as follows:

Cleo G. Clayton, Jr.,
210 First National Bank Building,
Amarillo, Texas.



APPENDIX A

Petitioners' Points of Error in No. 6737 in the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas, at Amarillo, styled H. L. CRAVENS and BILL P. YEAGER, Appellants v. CITY OF AMARILLO, Appellee. (Appellants' Brief 1-7):

POINT NO. ONE

The Trial Court erred in excluding the testimony of HOMER R. ROBBINS to the effect that, in his opinion, the market value of the subject land was $850.00 per acre because of its adaptability to subdivision uses.

POINT NO. TWO

The Trial Court erred in excluding the testimony of HOMER R. ROBBINS to the effect that, in his opinion, the subject land had a market value of 850.00 per acre based on the capitalization of its rental value because of its adaptability to subdivision uses.

POINT NO. THREE

The Trial Court erred in excluding the evidence of HOMER R. ROBBINS to the effect that, in his opinion, the subject land was economically adaptable to subdivision usages.

POINT NO. FOUR

The Trial Court erred in excluding the evidence of HOMER R. ROBBINS explaining why, in his opinion, the subject land was adaptable to subdivision usages.

POINT NO. FIVE

The Trial Court erred in excluding the testimony of HOMER R. ROBBINS as to what, in his opinion, was the highest and best use of the subject property.

POINT NO. SIX

The Trial Court erred in refusing to permit the witness HOMER R. ROBBINS to explain why, in his opinion, the subject land possessed a market value based upon its adaptability for subdivision purposes.

POINT NO. SEVEN

The Trial Court erred in excluding the testimony of HOMER R. ROBBINS as to why, in his opinion, the appraisers for Appellee were not placing a market value on the subject property according to its most profitable use.

POINT NO. EIGHT

The Trial Court erred in excluding the testimony of, HOMER R. ROBBINS as to why, in his opinion, the appraisers for Appellee were not placing a market value for the subject land according to its highest and best use.

POINT NO. NINE

The Trial Court erred in excluding the testimony of HOMER R. ROBBINS to the effect that, in his opinion, the method of capitalization of rental value as used generally by appraisers would show fallacies in the conclusions of the witnesses for Appellee as to the market value of the subject land.

POINT NO. TEN

The Trial Court erred in excluding the testimony of HOMER R. ROBBINS to the effect that, in his opinion, the subject property had a market value of $833.00 to $850.00 per acre because of its adaptability to subdivision purposes.

POINT NO. ELEVEN

The Trial Court erred in excluding the testimony of HOMER R. ROBBINS to the effect that, in his opinion, the subject property had a market value of $833.00 to $850.00 per acre after deduction of costs converting it to subdivision characteristics.

POINT NO. TWELVE

The Trial Court erred in excluding the testimony of H. L. CRAVENS to the effect that he was financially able to independently develop the subject land for subdivision uses.

POINT NO. THIRTEEN

The Trial Court erred in excluding the testimony of H. L. CRAVENS as to the market value he placed upon the subject land in consummating his negotiations in acquiring the land.

POINT NO. FOURTEEN

The Trial Court erred in excluding the testimony of H. L. CRAVENS as to his conclusions as to the market value of the subject land upon which he acquired the same.

POINT NO. FIFTEEN

The Trial Court erred in excluding the testimony of H. L. CRAVENS to the effect that he had determined he could procure financing facilities of the Federal Housing Administration if the subject land were adapted to subdivision uses.

POINT NO. SIXTEEN

The Trial Court erred in excluding the testimony of HUGH TULL regarding the amount he paid for his twelve (12) acre tract of land.

POINT NO. SEVENTEEN

The Trial Court erred in refusing to permit Appellants, upon cross-examination, to interrogate the witness GEORGE TURNLEY as to why he had concluded the subject land possessed a market value of only $200.00 per acre even if subdivided.

POINT NO. EIGHTEEN

The Trial Court erred in refusing to permit Appellants, upon cross-examination, to interrogate the witness GEORGE TURNLEY as to the basis for his conclusions that the direction of the runways of the Amarillo Air Base materially depreciated the market value of the subject lands for subdivisional purposes.

POINT NO. NINETEEN

The Trial Court erred in refusing to permit Appellants to interrogate the witness GEORGE TURNLEY, upon cross-examination, as to the price RUTH KLEIN paid for her property.

POINT NO. TWENTY

The Trial Court erred in excluding the testimony of ROSE MATHIS as to the value she received for her property.

POINT NO. TWENTY-ONE

If, in the opinion of this Honorable Court, this case is not required to be reversed upon one or several of the separate preceding points relied upon for reversal, then Appellants submit that the cumulative effect of the series of the aforementioned errors of the Trial Court will justify and require a reversal of this case.

POINT NO. TWENTY-TWO

In the event this Honorable Court is of the opinion that no error stated in Points One through Twenty, if taken separately constitutes reversal error, then it is respectfully urged that this accumulation of errors stated in Points One through Twenty, as committed by the Trial Court, deprived Appellants of their property without due process of law, contrary to the Fourteenth (14th) Amendment of the Constitution of the United States.

POINT NO. TWENTY-THREE

In the event this Honorable Court is of the opinion that no error stated in Points One through Twenty, if taken separately constitutes reversal error, then it is respectfully urged that this accumulation of errors stated in Points One through Twenty, as committed by the Trial Court, deprived Appellants of their property without due process of law, contrary to Section 17 of Article 1 of the Texas Constitution.

POINT NO. TWENTY-FOUR

In the event this Honorable Court is of the opinion that no error stated in Points One through Twenty, if taken separately constitutes reversal error, then it is respectfully urged that this accumulation of errors stated in Points One through Twenty, as committed by the Trial Court, deprived Appellants of their property contrary to Section 13 of Article 1 of the Texas Constitution.

POINT NO. TWENTY-FIVE

In the event this Honorable Court is of the opinion that no error stated in Points One through Twenty, if taken separately constitutes reversal error, then it is respectfully urged that this accumulation of errors stated in Points One through Twenty, as committed by the Trial Court, deprived Appellants of their property without due process of law, contrary to the provisions of Section 19 of Article 1 of the Texas Constitution.

POINT NO. TWENTY-SIX

In the event this Honorable Court is of the opinion that no error stated in Points One through Twenty, if taken separately constitutes reversal error, then it is respectfully urged that this accumulation of errors stated in Points One through Twenty, as committed by the Trial Court, deprived Appellants of their property for public use without "just compensation," contrary to the provisions of the Constitution of the United States.

APPENDIX B

Opinion of the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas sitting at Amarillo, reported at 309 S. W. 2d 903:

NO. 6737

H. L. CRAVENS & BILL P. YEAGER,
Appellants,

v.

CITY OF AMARILLO,
Appellee.

January 27, 1958

This appeal is from a judgment in a condemnation proceeding instituted by appellee, City of Amarillo, as condemnor, against appellants, H. L. Cravens and Bill P. Yeager, owners of the land involved. The record reveals that preliminary proceedings were previously had in the trial court on August 11, 1956, concerning the necessary prerequisites for a jury trial upon the controlling question in the case and that the parties have stipulated by agreement that appellee, City of Amarillo, had previously taken all necessary steps and procedures required by law to acquire the subject land under its powers of Eminent Domain for the purposes pleaded by appellee and that the land involved consists of 60.08 acres lying in the south part of Section 38, Block 2, A. B. & M. Survey, Potter County, Texas, leaving only the controlling issue of the market value of the said land in question to be determined. The

case was tried to a jury on May 2, 1957, with the single issue of the market value of the said land of date June 21, 1956, being submitted without objection of any party and as a result of the jury's answer thereto the trial court rendered judgment accordingly awarding appellants the sum of $15,000.00 for the said land being condemned, from which judgment appellants have perfected an appeal and have presented 26 points of error contending for various reasons that they did not receive "adequate or just compensation" for the land. A calculation will reveal that the jury found the market value of the land to be approximately $250.00 per acre.

Appellants grouped and briefed their first eleven points together charging error because the trial court excluded the testimony of the witness, Homer R. Robbins, to the effect that, in his opinion, the market value of the land in question was $850.00 per acre based upon reasons some given and others sought to be given by the witness. Appellee has challenged the manner of appellants' presentation of their first eleven points and charge that all of such points should be overruled because appellants have asked this court to examine and consider in connection with their said points all the testimony of the witness Homer R. Robbins from page 183 to page 259 in the statement of facts and have not set out "the full substance of the rejected testimony by reference to the pages in the record" as required under the provisions of Rule 418(c), T. R. C. P. We find some merit to appellee's challenge but because of our liberal practice to consider such points so long as we can determine with some

degree of certainty the contents and basis of the complaint made and because appellants have pointed out in some instances the pages of the record referred to, the said points are being considered by us. We likewise find that appellee, in the alternative, has replied to appellants' said eleven points, contending that such should all be overruled because the trial court did not exclude the testimony of the witness Homer R. Robbins as charged by appellants, but, on the contrary, the trial court admitted the testimony of the said witness to the effect that, in his opinion, the value of the land in question was $850.00 per acre and he gave his numerous reasons for so testifying.

The evidence reveals that the said 60.08 acres of land lies adjacent to the middle part of the south boundary line of Section 38 with the said tract of land being located 7½ miles east of the city limits of Amarillo, between two highways but separated from each of the highways by two leading railroads. There is evidence of probative force showing that the land is located approximately three-fourths of a mile south of U. S. Highway 66 and a mile or more north of Highway 287; that the said land was unimproved and had been farmed although was not then being farmed, and was surrounded by farms; that there was no road immediately east, west or south of the said land but there was a passable road 20 feet wide on the north side of the same but the said "land is practically isolated from the standpoint of having an outlet"; that the said land "is of the Pullman type soil" and has a "surface depth of 6 to 8 inches and is a silted clay and a subsoil that reaches down 42 inches or better."

The record reveals that the witness Homer R. Robbins testified at length for appellants with his testimony covering several pages in the statement of facts without being interrupted even by a question, in which testimony he gave a description and location of the land and his method of appraisal of the same until he began to "assume" the existence of improvements upon the land that were not there in order to establish appraisal by his method of "capitalization and the residual technique." Objections were made by appellee to such testimony upon the grounds that the witness was admittedly "assuming non-existent buildings, non-existent crops, non-existent capitalization rates on top of one presumption after another," based upon a subdivision of rural land, in order to establish "the highest and best use of the particular land." The trial court sustained such objections and required the further examination of the witness to be confined strictly to question and answer form without going into "ramifications" or giving a "discourse type of testimony", in order that opposing counsel may have an opportunity to make specific objections when desired. The trial court directed that questions be propounded to the witness one at a time concerning his method of appraisal of the said land in which event he would be permitted to answer such questions so long as he did so "in terms of the measure of damages." Following the instructions of the trial court the witness Robbins testified that after his "investigation and studies of all of the factors" he had testified about, he had reached an opinion or conclusion as to the cash market value of the said land and that in his opinion, based upon investigations made, coupled

with general conditions as they existed, which he took into consideration, together with the distance to the City of Amarillo, the location of the highways and "all the physical factors involved," including a consideration of a comparison of the land in question with the closest type of other land, the market value of the land as of June 21, 1956, was $850.00 per acre.

In our opinion appellants' complaints made in Points 1 to 11, both inclusive, are not supported by the record. The witness Robbins testified in effect that as a result of his investigation and studies of all of the existing factors and in considering all of the physical factors involved, in his opinion the said market value of the land was $850.00 per acre on the date in question. In our opinion the witness, according to his own testimony, finally based his opinion as to the value of the land upon logical and reasonable grounds, some of which were enumerated by him and others stated in a general way. We likewise believe the trial court correctly excluded testimony relating to remote, speculative and conjectural uses that may be made of the land in an attempt to fix its market value. The State of Texas v. Carpenter, 126 Tex. 604, 89 S. W. 2d 194, 200. For the reasons stated appellants' Points 1 to 11, both inclusive, are all overruled.

In presenting their said first eleven points of error, appellants therein charged also that the statement of facts "contains numerous jibes, innuendoes and indirect advantages" taken of the witness Homer R. Robbins but appellants have failed to point out to this court testimony in

support of such charges and they have likewise failed to present a point or assignment of error in support of their complaints and charges here made. They contend however in effect that by reason of such attitude toward the witness their rights were prejudiced before the jury, but no point or assignment has been presented in support of such contentions. In their statement and argument in support of their first eleven points, appellants also complain about other matters foreign to the complaints made in any of the eleven points. While all of appellants' said eleven points complain about the exclusion of certain testimony of the witness Homer R. Robbins and his reasons for fixing a market value of the land in question, they further therein complain and challenge some of the testimony of the witnesses, George Turnley and Royce Gaut, without directing any point or assignment of error by reason of such complaints. In the same manner appellants complain because they were not privileged to attack the credibility of the witnesses, Turnley and Gaut, by offering the testimony of Robbins in rebuttal thereto without first raising such issues by a point or assignment of error in support of their complaints so made. In our opinion none of the charges and complaints made about such matters are supported by the record but in any event under the elementary rules of procedure in briefing such charges and complaints are waived because no points or assignment of error were presented in support of same. Stroud v. Jones, 295 S. W. 2d 491 and other authorities there cited. In any event such complaints and charges are overruled because they are not supported

by any points and also because in our opinion they are not supported by the record in the case.

Appellants group and present together Points 12 to 15, both inclusive, charging error in Point 12 because the trial court excluded the testimony of appellant H. L. Cravens to the effect that he was financially able to independently develop the said land for subdivision usage. Concerning the claims and charges made in Point 12, appellant Cravens testified without objection as follows while being examined by his counsel:

"Q. (By Mr. Clayton) Did you get a commitment for a loan?

"A. Yes.

"Q. On the project?

"A. Yes.

"Q. It wasn't for farming, was it?

"A. No.

"Q. Was it for industrial purposes?

"A. No, only for building duplex houses.

"Q. And would it have been a substantial enough loan?

"A. Yes, but I could have built without the loan . . ."

"Q. (By Mr. Clayton) You disagree with these appraisers completely, don't you?

"A. Yes, sir, I sure do.

"Q. And you have dealt in land extensively, haven't you?

"A. Probably more than all of them put together.

"Q. Have you got a line of credit with the Dallas National Bank in order to do this very thing with?

"A. Yes, the First National Bank of Dallas.

"Q. What was the highest line of credit a bank ever loaned you in order to follow these foolish ventures?

"A. $870,000 * * *."

"Q. (By Mr. Clayton) You were financially able to do what you wanted to do, were you not, Mr. Cravens?

"A. Yes, sir.

"Q. —without any lending institutions?

"A. That's right."

In our opinion the foregoing testimony given by appellant Cravens refutes appellants' claims and charges made in Point 12 to the effect that the trial court excluded his testimony concerning his financial ability to independently develop the said land, for which reason the said point is overruled.

They charge error in Point 15 because Cravens' testimony was excluded to the effect he could procure financial aid from FHA if his land were adapted to subdivision usage. Concerning the claims and charges made by appellants in Point 15, appellant Cravens testified as follows while being examined by his own counsel:

"Q. (By Mr. Clayton) Mr. Cravens, after you and Mr. Yeager acquired this 60 acre tract, did you contact the Veteran's Administration to determine whether or not they would make loans on this property?

"A. No; because that wasn't the purpose of it, but I did contact—

MR. EDGAR: Excuse me—go ahead. I am a little premature.

"A. —I did contact the FHA.

"Q. Did the FHA tell you they would make a loan on this property?

"A. That they would make loans—

"Q. On this very property?

"A. On this property • • •.

"Q. (By Mr. Clayton) They did tell you that they would make loans on this very acreage, didn't they?

"A. Yes • • •."

"Q. (By Mr. Clayton) What type of project were you procuring a loan on?

"A. On a duplex, for rental purposes • • •."

In our opinion the foregoing testimony given by appellant Cravens refutes the claims and charges made by appellants in Point 15 to the effect that he had determined he could procure financial aid from FHA if the said land were adapted to subdivision usage, for which reason the said point is overruled.

They charge error in Point 13 because his testimony was excluded concerning the market value he placed upon the land in consummating his negotiations in acquiring the same, and they charge error in Point 14 because his testimony was excluded concerning his conclusions about the market value of his said land. Concerning the claims and charges made by appellants in their Points 13 and 14, they have failed to show by a bill of exception or otherwise what the testimony of appellant Cravens would have been

if he had been permitted to testify concerning the matters in question, for which reason appellants' Points 13 and 14 are overruled. Johnson v. Poe, 210 S. W. 2d 264, 266-267; Bradford v. Magnolia Pipe Line Co., 262 S. W. 2d 242, 245, and other authorities there cited: Mollinary v. Karam, 257 S. W. 2d 886 and other authorities there cited.

In any event market value in such a case should be based upon a reasonable cash value and a reasonable use for reasonable adaptability, and not upon some speculative, contemplated use to be made of the land or upon some speculative value growing out of the land trade or exchange for other property. Perry v. Wichita Falls, R. & F. W. R. Co., 238 S. W. 276; Ft. Worth Improvement Dist. No. 1 v. Weatherred, 149 S. W. 550; City of Houston v. Charpiot, 292 S. W. 2d 677; City of Austin v. Cannizzo, 153 Tex. 324, 267 S. W. 2d 808. Under the foregoing authorities and others, it is within the sound discretion of the trial court to determine whether or not other lands offered for trade are comparable so as to meet the test of similarity.

In presenting Points 12 to 15, both inclusive, appellants further complained about the trial court excluding testimony of some nature given by the witness Andrew D. Hudspeth without having presented a point of error in support of their complaints and without divulging or showing what such testimony of the said witness would have been if heard. For reasons previously stated and under authorities previously herein cited, such complaint must be overruled.

Appellants grouped and presented Points 16, 19 and 20 charging error committed in Point 16 because the trial court excluded the testimony of the witness Hugh Tull concerning the amount he paid for his 12-acre tract of land, charging error committed in Point 19 because the trial court refused to permit appellants to cross examine the witness George Turnley about the price Ruth Kline paid for her property, and charging error in Point 20 because the trial court excluded the testimony of the witness Rose Mathis about the value she received for her property. Appellants' Point 16 complaining about the exclusion of the testimony of the witness Hugh Tulle is overruled because appellants did not attempt to brief the charges or complaints therein made, for which reason such complaints and charges were waived. Crowell-Gifford Furniture Co. v. Cloutman, 276 S. W. 2d 539, 551; Doherty v. San Augustine Independent Sch. Dist., 178 S. W. 2d 866, 870 and other authorities there cited. Appellants' Points 19 and 20 are overruled for reasons previously given and under authorities previously cited because appellants failed to show by a bill of exception or otherwise what the testimony of the said witnesses Turnley and Mathis would have been if heard. In any event, the evidence reveals that the Tull and Kline tracts of land had both been previously subdivided and appellants' said land was for acerage and not for subdivision, while the property of Rose Mathis was hotel property and not similar in any respect to appellants' land. For reasons previously stated and under autnorities previously cited the properties complained about were not comparable

and not similar enough to furnish a fair basis for valuation of appellants' property in any event.

Appellants grouped and presented Points 17 and 18, charging error because the trial court refused to permit appellant to cross examine the witness, George Turnley, as to why he concluded that the market value of appellants' land was $200.00 per acre and as to the basis of his conclusions that the runways at the Amarillo Air Base reduced the market value of the said land. In our opinion the complaints here made are not supported by the record, which reveals that the witness Turnley did testify on cross examination about the matters complained of (S. F. 56-57). In support of complaints about the refusal to permit Turnley to testify, appellants cited "S. F. 88 and 90" which reveals the testimony of the witness, Royce Gaut, and has no connection with Turnley's testimony. For the reasons stated appellants' Points 17 and 18 are overruled.

In Points 21 to 26, both inclusive, appellants contend that, in case the trial court's judgment should not be reversed because of one or more of the previously assigned errors, it should be reversed because of the accumulative effect of the series of alleged errors previously presented and because appellants' property was taken without due process of law and in violation of the Federal and State Constitutions. In our opinion reversible errors have not been committed by the trial court but, assuming that error has been shown, under the provisions of Rules 434 and 503, T. R. C. P., the burden was then upon appellants to show from the record as a whole that such alleged error or

errors committed by the trial court amounted to such a denial of the rights of appellants as were reasonably calculated to cause and probably did cause the rendition of an improper judgment. Cruse v. Daniels, 293 S. W. 2d 616, 623-24; State of Texas v. Thompson, 290 S. W. 2d 319, 322; Walker v. Texas Employers' Ins. Ass'n., 291 S. W. 2d 298, 301. In the case at bar it is our opinion that appellants have failed to discharge such burden in any event.

Appellants contend that they have not had a fair trial and that their rights have been prejudiced. In our opinion the record does not support such contentions. The only issue to be determined was that of market value of the said land and we think such has been determined according to the Statute, Art. 3265(2), and as provided for by the rules of law. City of Austin v. Cannizzo, 153 Tex. 324, 267 S. W. 2d 808.

Under the authorities cited and many others, it is our opinion that appellants' constitutional rights have not been violated. Roberts v. City of New York, 295 U. S. 264, 55 S. Ct. 689, 79 L. Ed. 1429 at 1435-1436 (1935).

For the reasons stated, appellants' points of error are all overruled and the judgment of the trial court is affirmed.

PITTS, C. J.

APPENDIX C

Petitioners' Points of Error in Motion for Rehearing in No. 6737, in the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas, at Amarillo, styled H. L. CRAVENS and BILL [illegible]AGER, Appellants v. CITY OF AMARILLO, Appe[illegible]ppellants' Brief 1-10):

POINT NO. ONE

The Court of Civil Appeals erred in overruling and not sustaining Appellants' Point No. One as stated in Appellants' Brief, viz:

The Trial Court erred in excluding the testimony of HOMER R. ROBBINS to the effect that, in his opinion, the market value of the subject land was $850.00 per acre because of its adaptability to subdivision uses.

POINT NO. TWO

The Court of Civil Appeals erred in overruling and not sustaining Appellants' Point No. Two as stated in Appellants' Brief, viz:

The Trial Court erred in excluding the testimony of HOMER R. ROBBINS to the effect that, in his opinion, the subject land had a market value of $850.00 per acre based on the capitalization of its rental value because of its adaptability to subdivision uses.

POINT NO. THREE

The Court of Civil Appeals erred in overruling and not sustaining Appellants' Point No. Three as stated in Appellants' Brief, viz:

The Trial Court erred in excluding the evidence of HOMER R. ROBBINS to the effect that, in his opinion, the subject land was economically adaptable to subdivision usages.

POINT NO. FOUR

The Court of Civil Appeals erred in overruling and not sustaining Appellants' Point No. Four as stated in Appellants' Brief, viz:

The Trial Court erred in excluding the evidence of HOMER R. ROBBINS explaining why, in his opinion, the subject land was adaptable to subdivision usages.

POINT NO. FIVE

The Court of Civil Appeals erred in overruling and not sustaining Appellants' Point No. Five as stated in Appellants' Brief, viz:

The Trial Court erred in excluding the testimony of HOMER R. ROBBINS as to what, in his opinion, was the highest and best use of the subject property.

POINT NO. SIX

The Court of Civil Appeals erred in overruling and not sustaining Appellants' Point No. Six as stated in Appellants' Brief, viz:

The Trial Court erred in refusing to permit the witness HOMER R. ROBBINS to explain why, in his opinion, the

subject land possessed a market value based upon its adaptability for subdivision purposes.

POINT NO. SEVEN

The Court of Civil Appeals erred in overruling and not sustaining Appellants' Point No. Seven as stated in Appellants' Brief, viz:

The Trial Court erred in excluding the testimony of HOMER R. ROBBINS as to why, in his opinion, the appraisers for Appellee were not placing a market value on the subject property according to its most profitable use.

POINT NO. EIGHT

The Court of Civil Appeals erred in overruling and not sustaining Appellants' Point No. Eight as stated in Appellants' Brief, viz:

The Trial Court erred in excluding the testimony of HOMER R. ROBBINS as to why, in his opinion, the appraisers for Appellee were not placing a market value for the subject land according to its highest and best use.

POINT NO. NINE

The Court of Civil Appeals erred in overruling and not sustaining Appellants' Point No. Nine as stated in Appellants' Brief, viz:

The Trial Court erred in excluding the testimony of HOMER R. ROBBINS to the effect that, in his opinion, the method of capitalization of rental value as used gener-

ally by appraisers would show the fallacies in the conclusions of the witnesses for Appellee as to the market value of the subject land.

POINT NO. TEN

The Court of Civil Appeals erred in overruling and not sustaining Appellants' Point No. Ten as stated in Appellants' Brief, viz:

The Trial Court erred in excluding the testimony of HOMER R. ROBBINS to the effect that, in his opinion, the subject property had a market value of $833.00 to $850.00 per acre because of its adaptability to subdivision purposes.

POINT NO. ELEVEN

The Court of Civil Appeals erred in overruling and not sustaining Appellants' Point No. Eleven as stated in Appellants' Brief, viz:

The Trial Court erred in excluding the testimony of HOMER R. ROBBINS to the effect that, in his opinion, the subject property had a market value of $833.00 to $850.00 per acre after deduction of costs converting it to subdivision characteristics.

POINT NO. TWELVE

The Court of Civil Appeals erred in overruling and not sustaining Appellants' Point No. Twelve as stated in Appellants' Brief, viz:

The Trial Court erred in excluding the testimony of H. L. CRAVENS to the effect that he was financially able

to independently develop the subject land for subdivision uses.

POINT NO. THIRTEEN

The Court of Civil Appeals erred in overruling and not sustaining Appellants' Point No. Thirteen as stated in Appellants' Brief, viz:

The Trial Court erred in excluding the testimony of H. L. CRAVENS as to the market value he placed upon the subject land in consummating his negotiations in acquiring the land.

POINT NO. FOURTEEN

The Court of Civil Appeals erred in overruling and not sustaining Appellants' Point No. Fourteen as stated in Appellants' Brief, viz:

The Trial Court erred in excluding the testimony of H. L. CRAVENS as to his conclusions as to the market value of the subject land upon which he acquired the same.

POINT NO. FIFTEEN

The Court of Civil Appeals erred in overruling and not sustaining Appellants' Point No. Fifteen as stated in Appellants' Brief, viz:

The Trial Court erred in excluding the testimony of H. L. CRAVENS to the effect that he had determined he could procure financing facilities of the Federal Housing

Administration if the subject land were adapted to subdivision uses.

POINT NO. SIXTEEN

The Court of Civil Appeals erred in overruling and not sustaining Appellants' Point No. Sixteen as stated in Appellants' Brief, viz:

The Trial Court erred in excluding the testimony of HUGH TULL regarding the amount he paid for his twelve (12) acre tract of land.

POINT NO. SEVENTEEN

The Court of Civil Appeals erred in overruling and not sustaining Appellants' Point No. Seventeen as stated in Appellants' Brief, viz:

The Trial Court erred in refusing to permit Appellants, upon cross-examination, to interrogate the witness GEORGE TURNLEY as to why he had concluded the subject land possessed a market value of only $200.00 per acre even if subdivided.

POINT NO. EIGHTEEN

The Court of Civil Appeals erred in overruling and not sustaining Appellants' Point No. Eighteen as stated in Appellants' Brief, viz:

The Trial Court erred in refusing to permit Appellants, upon cross-examination, to interrogate the witness GEORGE TURNLEY as to the basis for his conclusions

that the direction of the runways of the Amarillo Air Base materially depreciated the market value of the subject lands for subdivisional purposes.

POINT NO. NINETEEN

The Court of Civil Appeals erred in overruling and not sustaining Appellants' Point No. Nineteen as stated in Appellants' Brief, viz:

The Trial Court erred in refusing to permit Appellants to interrogate the witness GEORGE TURNLEY, upon cross-examination, as to the price RUTH KLEIN paid for her property.

POINT NO. TWENTY

The Court of Civil Appeals erred in overruling and not sustaining Appellants' Point No. Twenty as stated in Appellants' Brief, viz:

The Trial Court erred in excluding the testimony of ROSE MATHIS as to the value she received for her property.

POINT NO. TWENTY-ONE

The Court of Civil Appeals erred in overruling and not sustaining Appellants' Point No. Twenty-one as stated in Appellants' Brief, viz:

If, in the opinion of this Honorable Court, this case is not required to be reversed upon one or several of the separate

preceding points relied upon for reversal, then Appellants submit that the cumulative effect of the series of the aforementioned errors of the Trial Court will justify and require a reversal of this case.

POINT NO. TWENTY-TWO

The Court of Civil Appeals erred in overruling and not sustaining Appellants' Point No. Twenty-two as stated in Appellants' Brief, viz:

In the event this Honorable Court is of the opinion that no error stated in Points One through Twenty, if taken separately constitutes reversible error, then it is respectfully urged that this accumulation of errors stated in Points One through Twenty, as committed by the Trial Court, deprived Appellants of their property without due process of law, contrary to the Fourteenth (14th) Amendment to the Constitution of the United States.

POINT NO. TWENTY-THREE

The Cour of Civil Appeals erred in overruling and not sustaining Appellants' Point No. Twenty-three as stated in Appellants' Brief, viz:

In the event this Honorable Court is of the opinion that no error stated in Points One through Twenty, if taken separately constitutes reversible error, then it is respectfully urged that this accumulation of errors stated in Points One through Twenty, as committed by the Trial Court, deprived

Appellants of their property without due process of law, contrary to Section 17 of Article 1 of the Texas constitution.

POINT NO. TWENTY-FOUR

The Court of Civil Appeals erred in overruling and not sustaining Appellants' Point No. Twenty-four as stated in Appellants' Brief, viz:

In the event this Honorable Court is of the opinion that no error stated in Points One through Twenty, if taken separately constitutes reversal error, then it is respectfully urged that this accumulation of errors stated in Points One through Twenty, as committed by the Trial Court, deprived Appellants of their property contrary to Section 13 of Article 1 of the Texas Constitution.

POINT NO. TWENTY-FIVE

The Court of Civil Appeals erred in overruling and not sustaining Appellants' Point No. Twenty-five as stated in Appellants' Brief, viz:

In the event this Honorable Court is of the opinion that no error stated in Points One through Twenty, if taken separately constitutes reversal error, then it is respectfully urged that this accumulation of errors stated in Points One through Twenty, as committed by the Trial Court, deprived Appellants of their property without due process of law, contrary to the provisions of Section 19 of Article 1 of the Texas Constitution.

POINT NO. TWENTY-SIX

The Court of Civil Appeals erred in overruling and not sustaining Appellants' Point No. Twenty-six as stated in Appellants' Brief, viz:

In the event this Honorable Court is of the opinion that no error stated in Points One through Twenty, if taken separately constitutes reversal error, then it is respectfully urged that this accumulation of errors stated in Points One through Twenty, as committed by the Trial Court, deprived Appellants of their property for public use without "just compensation", contrary to the provisions of the Constitution of the United States.

APPENDIX D

Petitioners' Points of Error in Application for Writ of Error, in the Supreme Court of Texas, in No. A-6787, styled H. L. CRAVENS and BILL P. YEAGER, Petitioners, v. CITY OF AMARILLO, Respondent (Petitioners' Brief 1-5):

POINT NUMBER ONE

The Court of Civil Appeals erred in sustaining the action of the Trial Court in excluding the testimony of HOMER R. ROBBINS to the effect that, in his opinion, the subject land had a market value of $850.00 per acre based on the capitalization of its rental value because of its adaptability to subdivision uses.

POINT NUMBER TWO

The Court of Civil Appeals erred in sustaining the action of the Trial Court in excluding the evidence of HOMER R. ROBBINS to the effect that, in his opinion, the subject land was economically adaptable to subdivision usages.

POINT NO. THREE

The Court of Civil Appeals erred in sustaining the action of the Trial Court in excluding the evidence of HOMER R. ROBBINS explaining why, in his opinion, the subject land was adaptable to subdivision usages.

POINT NO. FOUR

The Court of Civil Appeals erred in sustaining the action of the Trial Court in refusing to permit the witness,

HOMER R. ROBBINS, to explain why, in his opinion, the subject land possessed a market value based upon its adaptability for subdivision purposes.

POINT NUMBER FIVE

The Court of Civil Appeals erred in sustaining the action of the Trial Court in excluding the testimony of HOMER R. ROBBINS as to why, in his opinion, the appraisers for the CITY were not placing a market value for the subject land according to its highest and best use.

POINT NUMBER SIX

The Court of Civil Appeals erred in sustaining the action of the Trial Court in excluding the testimony of HOMER R. ROBBINS to the effect that, in his opinion, the method of capitalization of rental value as used generally by appraisers would show the fallacy in the conclusions of the witnesses for the CITY as to the market value of the subject land.

POINT NUMBER SEVEN

The Court of Civil Appeals erred in sustaining the action of the Trial Court in excluding the testimony of HOMER R. ROBBINS to the effect that, in his opinion, the subject property had a market value of $833.00 to $850.00 per acre because of its adaptability to subdivision purposes.

POINT NUMBER EIGHT

The Court of Civil Appeals erred in holding and finding that the accumulated effect of the series of the aforemen-

tioned Points of Error, as committed by the Trial Court, did not justify and require a reversal of this case.

POINT NUMBER NINE

The Court of Civil Appeals erred in finding and holding that even though the aforementioned Points of Error, if taken separately did not constitute reversible error, that the accumulation of such errors as stated in points, aforesaid, as committed by the Trial Court, did not deprive Petitioners of their property without due process of law, contrary to the Fourteenth (14th) Amendment to the Constitution of the United States.

POINT NUMBER TEN

The Court of Civil Appeals erred in finding and holding that even though the aforementioned Points of Error, if taken separately did not constitute reversible error, that the accumulation of such errors as stated in points, aforesaid, as committed by the Trial Court, did not deprive Petitioners of their property without due process of law, contrary to Section 17 of Article 1 of the Texas Constitution.

POINT NUMBER ELEVEN

The Court of Civil Appeals erred in finding and holding that even though the aforementioned Points of Error, if taken separately did not constitute reversible error, that the accumulation of such errors as stated in points, aforesaid, as committed by the Trial Court, did not deprive Pe-

titioners of their property contrary to Section 13 of Article 1 of the Texas Constitution.

POINT NUMBER TWELVE

The Court of Civil Appeals erred in finding and holding that even though the aforementioned Points of Error, if taken separately did not constitute reversible error, that the accumulation of such errors as stated in points, aforesaid, as committed by the Trial Court, did not deprive Petitioners of their property without due process of law, contrary to the provisions of Section 19, of Article 1 of the Texas Constitution.

POINT NUMBER THIRTEEN

The Court of Civil Appeals erred in finding and holding that even though the aforementioned Points of Error, if taken separately did not constitute reversible error, that the accumulation of such errors as stated in points, aforesaid, as committed by the Trial Court, did not deprive Petitioners of their property for public use without "just compensation", contrary to the provisions of the Constitution of the United States.